No. 755

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FIRST AGRICULTURAL NATIONAL BANK
OF BERKSHIRE COUNTY,
Appellant,

v.

STATE TAX COMMISSION,
Appellee.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

---

BRIEF OF THE NATIONAL ASSOCIATION OF SUPERVISORS OF STATE BANKS AS AMICUS CURIAE

JAMES F. BELL
BRIAN C. ELMER
1100 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for National Association of Supervisors of State Banks

Of Counsel:

REAVIS, POGUE, NEAL & ROSE

March 29, 1968

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 755

FIRST AGRICULTURAL NATIONAL BANK
OF BERKSHIRE COUNTY,
Appellant,

v.

STATE TAX COMMISSION,
Appellee.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

---

BRIEF OF THE NATIONAL ASSOCIATION OF SUPERVISORS OF STATE BANKS AS AMICUS CURIAE

INTRODUCTION

The National Association of Supervisors of State Banks respectfully submits this brief as amicus curiae in support of Appellee in this case.

The Association requested Appellant's consent to the filing of this brief. Such consent was refused and, accordingly, a motion for leave to file such brief pursuant to Rule 42 of this Court's Rules has contemporaneously been filed herewith.

The Association. The National Association of Supervisors of State Banks (hereinafter the "Supervisors" or the "Association") was founded in 1902 and has 52 members. It is composed of the officials of state governments responsible for the supervision of state-chartered banking institutions in every state of the United States, Puerto Rico and the Virgin Islands. As of June 30, 1967, there were 9,487 commercial and mutual savings banks chartered under state laws subject to the Supervisors' jurisdiction with total resources of approximately 237 billion dollars. See Appendix A.

The Board of Directors of the Association, consisting of Supervisor members, is the governing body of the Association under its Articles, having authority to supervise its affairs and determine its policies.

State banks were invited to join the Association as "associate" members beginning in 1958. There are currently 4,434 such dues paying associate members. Representatives from the associate membership advise and assist the Board of Directors.

Position of the Supervisors. The ultimate question before the Court in this case is whether the State of Massachusetts may impose a nondiscriminatory general sales and use tax on a national bank located within that state. This tax is applicable to, and paid by, state banks located within the state.

This ultimate issue, in turn, brings before this Court two subsidiary questions upon which the Supervisors take the following position:

First, under the current factual situation surrounding the status and function of national banks within the banking structure of the United States, can national banks still be considered fiscal or monetary agents of the United States so as to continue to be eligible to hold the status of a tax-immune instrumentality? There is no dispute with regard to applicable constitutional law: agencies and

instrumentalities of the United States are immune from state and local taxation, absent Congressional assent, and there has been no specific statutory assent to the application of Massachusetts' sales and use taxes to national banks. The question, however, is whether national banks can *currently* be considered fiscal or monetary agents of the United States Government entitled to claim such tax immunity. The Supervisors' position is that while national banks *were* once federal instrumentalities entitled to constitutional immunity, such is clearly not the case *today*.

Assuming that the Court answers the first question in the negative, a second question arises. Has Congress specifically prohibited the states from including national banks within the scope of a nondiscriminatory sales and use tax? There is no specific exclusion in the National Bank Act prohibiting state sales and use taxes, nor has this Court ever held that such a prohibition of such taxes is implied from that Act. Appellant asserts, however, that the provision in the National Bank Act initially passed by Congress in 1864,[1] and now set forth in 12 U.S.C. § 548, constitutes an automatic Congressional proscription of all state taxes on national banks not specifically enumerated or discussed therein. The Supervisors' position is that this assertion is not justified by a reading of the statute or of its legislative history, or by the application of recognized canons of statutory construction. Further, decisions of this Court, cited by Appellant in support of its contention, are decisions influenced by the "federal instrumentality" status heretofore accorded national banks, based upon now-changed facts and are no longer tenable. Finally, Appellant's plea for tax immunity runs counter to decisions of this Court for the past three decades which have, with increasing frequency, de-

[1] Act of June 3, 1864, c. 106, § 41, 13 Stat. 111.

nied assertions of an implied immunity from nondiscriminatory state taxation.[2]

Interest of the Supervisors. The Supervisors have a keen interest in the resolution of the foregoing questions.

As officials of the governments of the various states, they, of course, share the concern of the Appellee over the necessity of seeking additional revenue, on the basis of a fair tax structure, in order to meet ever-increasing demands.[3] Such a concern has also underlined this Court's decisions reflecting a general curtailment of tax immunity in recent years (p. 28, *infra*).

The Supervisors' crucial interest in this case, however, is broader than that of Appellee. It relates to their responsibility for a sound state-chartered banking system able to meet the needs of the communities which it serves, and able to grow within the framework of the dual banking system.

The present system of federally chartered, or national banks, was created in 1863 (p. 15, *infra*). The Comptroller of the Currency is authorized to charter and supervise national banks under the provisions of the National Bank Act.[4] As of June 30, 1967, there were 4,780 national banks with assets in excess of 242 billion dollars. See Appendix A. State banks, under state charters, and national banks, under federal charter, together comprise the "dual banking system" of the United States.

---

[2] The Supervisors take no position on the remaining question before this Court: whether the incidence of the taxes fall on the seller or the buyer.

[3] State sales and use taxes only became prevalent during the second and third decade of this century. As state expenditures increased from $10.8 billion in 1950 to $31.3 billion in 1965 the revenue resulting from sales taxes rose from $1.6 billion in 1950 to $6.7 billion in 1965 and $7.8 billion in 1966. Tax Foundation, Inc., *Facts and Figures on Government Finance*, pp. 157, 187 (1967). The importance of such revenue is obvious.

[4] Act of June 3, 1864, c. 106, 13 Stat. 99, 12 U.S.C. § 21 *et seq.*

It is elementary economics that although state statutes, governing state banks, and the National Bank Act, governing national banks, can (and do) vary in many significant areas, the survival of one or the other class of banks in any state must rest upon an equality in certain basic competitive areas. If one or the other class of banks in a particular state is substantially underprivileged, such underprivileged banks will convert to the other system, eventually leaving the dual banking system an empty shell.

Such a competitive inequality exists in a number of states with regard to sales and use taxes. As indicated by Appendix B, there are forty-four states which presently impose such taxes. In twenty of these states, national banks are expressly exempt from such taxes by way of a statutory provision, regulation, or administrative or court ruling, and whenever the basis for that exemption is stated, it is because of a belief that national banks hold a constitutionally-immune status with regard to such taxes. Accordingly, as the court below found, whereas "plaintiff national bank enjoys the benefits of State and local services, the protection of the laws of the State, access to its courts, and the patronage of its citizens", it nevertheless escapes "a tax borne by its State chartered competitors" placing them at a "competitive disadvantage" (Jur.St., p. 48).[5]

Further, a decision by this Court dealing in depth with the issues set forth above may have an impact beyond the single issue of the applicability of general sales and use taxes to national banks. Appellant in its Jurisdic-

[5] Some states have avoided the problem of competitive inequality by exempting state banks from the sales tax *because* national banks are considered to be exempt. See Appendix B. On the other hand, as indicated by the case below, *Liberty Nat'l Bank & Trust Co.* v. *Buscaglia*, _____ N.Y. 2d _____ (1967), and several of the recent rulings set out in Appendix B, other states are challenging the tax immunity claimed by national banks from states sales and use taxes.

tional Statement filed with this Court made the following succinct statement with which the Supervisors fully agree:

> "The relationship of national banks to the Federal Government is an important factor affecting the status of national banks under a vast spectrum of state law. A decision by this Court with respect to the status of national banks as instrumentalities of the Federal Government, therefore, would have a far-reaching effect on the extent to which states can tax, regulate and otherwise impose their authority on such banks. For this reason, such a decision would affect approximately 4,800 national banks conducting banking operations in all of the several states." Juris. St., p. 24.

Equally so, the decision of this Court will affect the 9,487 state banks conducting banking operations in all of the several states. Their ability to compete with national banks depends, in large part, upon whether both classes of banks play by the same basic "ground rules" in important competitive areas. The question of the applicability of state law to national banks, therefore, assumes a status of critical importance to the maintenance of competitive equality between national and state banks within the framework of the dual banking system. It is for this reason that the Supervisors seek to appear as amicus curiae in this case.

SUMMARY OF ARGUMENT

With regard to areas other than state taxation, the applicability of state law to national banks has been resolved by this Court in a long line of decisions, the most recent of which was made last term in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). Congress, in the exercise of its power over national banks, has given a special significance to the applicability of state law to national banks. In some of the most important areas of competition between national and state

banks, Congress has in the National Bank Act specifically adopted state law as the standard for national banks. Further, in addition to specifically applying state law to national banks in many instances, Congress did not seek to occupy the field so as to preclude the application of state laws to national banks which do not conflict with federal law. This special significance granted to the applicability of state law to national banks has been described by this Court as a "policy of equalization" adopted in the National Bank Act of 1864. *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559, 565-566 (1934).

In the area of state law relating to taxation, however, the applicability of the "policy of equalization" is less clear. In *Lewis* v. *Fidelity & Deposit Co.*, *supra*, Mr. Justice Brandeis indicated that the "policy of equalization" *was* applicable to state taxation of national banks. Writing for the Court he said: "The policy of equalization was adopted in the National Bank Act of 1864, and has ever since been applied in the provision concerning *taxation.*" (Footnote omitted) (Emphasis added). In support of this assertion, he cited Section 5219, 12 U.S.C. § 548, which is the taxation provision in the National Bank Act (upon which Appellant relies in its argument here that it is immune from a state sales and use tax applicable to its state bank competitors) as well as a number of decisions of this Court. These cases made it clear that the "main purpose . . . of Congress in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character" and that the "language of the Act of Congress is to be read in the light of this policy." *Mercantile National Bank* v. *New York*, 121

U.S. 138, 155 (1887). See also, *Michigan National Bank* v. *Michigan*, 365 U.S. 467, 476-477 (1961).

The question remains, however, as to whether the intent of Congress was solely to establish a "policy of equalization" with regard to the application to national banks of those taxes *specifically* specified in Section 5219, which admittedly do not include state sales and use taxes, or whether Congress intended what might be termed a "policy of inequality" with regard to all *other* taxes not specifically mentioned, and intended to prohibit the application of such other taxes to national banks even though they are paid by competing state banks and are nondiscriminatory in nature.

Appellant relies upon cases decided by this Court the effect of which is to so hold. They find that national banks are "federal instrumentalities" and, therefore, are within the scope of the principle of constitutional law prohibiting taxation by state and local government of federal instrumentalities absent Congressional assent. The Supervisors urge a reconsideration of these cases for, as Mr. Justice Brandeis has written, in "cases involving constitutional issues . . . this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement *with experience and facts newly ascertained*, so that its judicial authority may . . . 'depend altogether on the force of the reasoning by which it is supported'."[6] Appellant would claim that these cases are so "embedded" in the law, that they may not be disturbed. But certainly this Court, on different facts, has not hesitated to reverse prior application of constitutional doctrine equally long "embedded" in the law.

Both the court below and the Court of Appeals of New York in *Liberty National Bank & Trust Co.* v. *Buscaglia*, ____ N.Y. 2d ____ (1967) have set forth a scholarly

---

[6] *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 412-3 (1932) (dissenting opinion) (Emphasis added). To the same effect, see decisions of this Court at p. 12.

development of the status and function of national banks since their creation in 1863, and of their predecessors, the first (1791-1811) and second (1816-1832) Banks of the United States established during the early years of the Republic. Whereas once these banks may have played an important role in the fiscal operations of the Government, particularly with regard to the issuance of currency, this role diminished to the point of extinction with the adoption of the elaborate system of monetary controls in the Federal Reserve Act of 1913,[7] and the retirement of notes issued by the national banks in 1935.[8] There is, in fact, little distinction today between national and state banks operating side by side throughout the United States insofar as they may be considered fiscal or monetary agencies of the United States. Certainly, for this purpose there is no difference *whatever* between national banks and state banks which are members of the Federal Reserve System.[9]

The opinion of the court below, and of the New York Court of Appeal in *Liberty National Bank*, have also demonstrated that decisions of this Court finding national banks "federal instrumentalities" for the purpose of an implied state tax immunity were based upon a factual base utterly different from that existing today and that more recent decisions of this Court repeating that doctrine had not re-examined the factual base upon which the earlier decisions were made in the light of the current banking structure of the United States.

---

[7] Act of Dec. 23, 1913, c. 6, 38 Stat. 251, 12 U.S.C. § 221 *et seq.*

[8] *See* 12 U.S.C. § 41.

[9] Of the 8,982 commercial state banks, 1,327 belong to the Federal Reserve System. These are the largest and most powerful state banks, as evidenced by the fact that their assets comprise 58% of all assets of all state commercial banks. See Appendix A. The remaining commercial state banks are almost all non-member banks insured by the Federal Deposit Insurance Corporation. A very few fall into neither category. *Id.*

Appellant's second line of argument purports to be separate and apart from the "federal instrumentality" decisions of this Court. It contends that Congress, in the exercise of its authority over national banks which it authorized, specifically intended a partial policy of inequality with regard to state taxation. Appellant bases this argument on the proposition that in 12 U.S.C. § 548 Congress authorized state taxation of national banks in only one of four specified methods (in addition to taxation of real estate), and that the failure of Congress to specify other taxes, such as sales and use taxes, constitutes a specific demonstration of Congressional intent to prohibit such other forms of state taxation.

In support of the foregoing proposition, Appellant cites the legislative history of the 1864 provision now set forth in 12 U.S.C. § 548. However, a fair reading of the legislative history does not support that conclusion. It is apparent that Congress was concerned with dealing with the method by which states might employ the specific taxation which Mr. Justice Marshall had indicated in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the states already possessed, and was seeking to assure a nondiscriminatory application of such taxes. An effort to assure a nondiscriminatory implementation of certain taxing authority does not, as Appellant contends, constitute a finding of Congressional intent to bar all *other* forms of nondiscriminatory state taxation. Far more appropriate in the premises is the often-employed canon of statutory construction applied by this Court to the effect that tax immunity is lightly to be implied. Further the decisions relied upon by the Appellant in support of its argument can be traced to *M'Culloch*, or to *Owensboro* which, in turn, relied upon *M'Culloch*,[10] demonstrating the continu-

---

[10] The cases primarily relied upon by appellant in this regard are cited at page 11 of Appellant's brief. *Owensboro Nat'l Bank* v. *Owensboro*, 173 U.S. 664, 667 (1889) relies upon *M'Culloch*. *Bank of California* v. *Richardson*, 248 U.S. 476, 482, 483 (1919) in turn

ing influence in such decisions of the now outdated doctrine of national banks as "federal instrumentalities". As such, they should not be permitted to bar the applicability of nondiscriminatory state sales and use taxes to national banks when such taxes are applicable to their competitor state banks.

Finally, it should be emphasized, Appellant does not claim, nor could it claim, that the application of state sales and use taxes to national banks would discriminate against national banks, or would adversely affect, or interfere with, their operations or will constitute a burden on any operation of the United States Government. The sole basis for Appellant's insistance on a tax advantage over its state bank competitors is an historical and legal anachronism related to another era which should be rejected by this Court.[11]

ARGUMENT

I. A National Bank Is Not an Instrumentality of the Federal Government Immune From Nondiscriminatory State Taxation

That instrumentalities of the federal government are immune from state taxation except as Congress may oth-

---

relies upon *Owensboro* and *M'Culloch*. *Des Moines Nat'l Bank* v. *Fairweather*, 263 U.S. 103, 107 (1923) relies on *Owensboro*. *First Nat'l Bank of Guthrie Center* v. *Anderson*, 269 U.S. 341, 347 (1926) relies upon *Des Moines*. *First Nat'l Bank of Hartford* v. *Hartford*, 273 U.S. 548, 550 (1927) relies upon *Anderson* and *Des Moines*. *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 244 (1931), relies upon *Anderson*. *Maricopa County* v. *Valley Nat'l Bank*, 318 U.S. 357, 361 (1943) relies upon *Owensboro* and *Des Moines*. *Colorado Nat'l Bank* v. *Bedford*, 310 U.S. 41, 50 (1940), relies upon *Owensboro* and *Richardson*. Finally, *Michigan Nat'l Bank* v. *Michigan*, 365 U.S. 467, 470 (1961), relies upon *Anderson* and *Des Moines*.

[11] In this regard, it should be noted that the United States Government has not sought to intervene in this proceeding, or, indeed, even to appear, in order to support Appellant's contention that national banks are immune from nondiscriminatory state taxation.

erwise provide is a sound and well established constitutional principle with which the Supervisors have no quarrel. It is apparent that this Court has held, on a number of occasions dating back to the landmark decision in *M'Culloch* v. *Maryland*,[12] that national banks are such instrumentalities of the federal government and entitled to this constitutional immunity from state taxation. The holdings of this Court have, however, taken place over a period of one hundred and fifty years during which the banking structure in the United States has undergone numerous and drastic changes. The Supervisors submit that these changes require an extensive re-examination of the position of national banks within the banking structure of the United States to determine if, at the present time, national banks are still instrumentalities of the federal government entitled to constitutional immunity from state taxation.

This Court has recognized the need for re-examination of constitutional determinations especially those which depend for their validity on factual analysis. *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (overruling *Plessy* v. *Ferguson*, 163 U.S. 537). Constitutional questions frequently depend upon the specific facts presented. Where those facts range materially the Court must again determine whether the constitutional principal when applied to the new facts leads to the same result. As was stated in *Smith* v. *Allwright*, 321 U.S. 649, 665-6 (1944):

> "[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice and this practice has continued to this day. This is particularly true when the decision believed erroneous is the applica-

[12] 17 U.S. (4 Wheat.) 316 (1819).

> tion of a constitutional principal rather than an interpretation of the Constitution to extract the principle itself." (Footnotes omitted)[13]

Thus the question here—whether national banks are instrumentalities of the federal government—is precisely the type which must be decided in light of current facts and not merely by reference to prior decisions.

The Supervisors believe that such an examination will result in a finding by this Court, in accord with the findings of the court below, and of the New York Court of Appeals in the *Liberty National Bank Case, supra,* that national banks are no longer instrumentalities of the federal government but are merely private corporations created for profit which, while serving certain government purposes, are not federal instrumentalities constitutionally immune from state taxation. Such a result does not, of course, require that *M'Culloch* be overruled but merely a determination that the doctrine of that case is not applicable to national banks as they exist *today.*

In order to place these earlier decisions in their historical context and determine the current status of national banks with regard to the immunity doctrine, it is helpful to examine briefly the financial history of the United States, particularly with regard to monetary controls and currency issuance.[14] This history will demonstrate that note issuance was the outstanding function of banks in the earlier periods of American banking history and, indeed, banks in which the United States Government had an interest issuing such notes were clearly fiscal agents of the United States through which it was exercising its sovereign powers. By contrast, the deposit function is

---

[13] For examples of the application of this doctrine see 321 U.S. at 665 n. 11.

[14] See generally, Board of Governors of the Federal Reserve System, *Banking Studies* (1941); Studenski & Krooss, *Financial History of the United States* (2nd ed 1963); Hackley, "Our Baffling Banking System" 52 Va. L. Rev. 565 (May, 1966).

the principal activity of banks today; notes are no longer issued by privately managed banks (national banks ceased that function in 1935); and monetary control rests primarily with the Federal Reserve System.

1782-1863: the First and Second Banks of the United States; the M'Culloch and Osborne decisions. In early American banking the process of extending credit resulted in an enlargement of bank note circulation and not, as at present, in an enlargement of deposits. When loans were made, the borrowers customarily received the amount in bank notes. These notes, transferred from hand to hand, constituted the greater part of the public's means of monetary payment, supplementing gold and silver coin.

The first "Bank of the United States" was chartered by Congress in 1791.[15] The bank was designed by Hamilton as a medium for establishing the finances of the new Government by furnishing a considerable share of the country's circulating currency (over one-fifth), and by assisting in the maintenance of a currency of more or less uniform value throughout the country by promptly presenting for redemption notes of other banks deposited with it.

The charter of the First Bank expired in 1811. The loss of the bank's services as a fiscal agent, coupled with the widespread depreciation of over one-third in the notes of many state banks, led to the formation of the second "Bank of the United States" in 1816.[16] These were the significant features of that Bank:[17]

(1) The federal government subscribed to and owned 20% of its capitol stock;

(2) The federal government appointed 20% of its board of directors;

---

[15] Act of Feb. 25, 1791, c. 10, 1 Stat. 191.

[16] Act of April 10, 1816, c. 44, 3 Stat. 266.

[17] See Studenski & Krooss, *supra*, n. 14, at pp. 83-84.

(3) Special congressional committees could examine the bank's affairs;

(4) Notes issued by the bank were legal tender for federal debts;

(5) The Secretary of the Treasury was required to deposit all federal funds in the bank;

(6) The bank was required to transmit funds for the federal government without charge;

(7) The bank acted as fiscal agent for the federal government and handled its foreign exchange transactions.

This was the bank which was the subject of this Court's decisions in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) and in *Osborne* v. *United States*, 22 U.S. (9 Wheat.) 738 (1824). There the Court struck down attempts by the States of Maryland and Ohio to tax operations of the bank while, at the same time, exempting state chartered banks. This Court recognized the bank as "the great instrument by which fiscal operations of the government are effected", 22 U.S. 738, 860, and announced the tax immunity doctrine now under consideration in this case.

1863-1913: the creation of national banks; Owensboro; the emergence of the dual banking system. The second Bank of the United States was a victim of politics. Jackson attacked it as both unconstitutional and monopolistic, and in 1832 he vetoed a rechartering of the Bank after the expiration of its charter in 1836.[18] During the Civil War Secretary of Treasury Salmon P. Chase saw two significant advantages to a system of banks chartered by the federal government issuing notes secured only by their holdings of government bonds. Such a system would provide a market for government bonds and hence funds required to finance the Civil War. It would also replace the

[18] See Hammond, *Banks and Politics in America* p. 495, (1957).

highly diversified issues of state bank notes which would be encouraged out of existence by a heavy federal tax. Such was the import of the legislation of Congress in 1863,[19] 1864,[20] and 1865.[21]

In *Owensboro National Bank* v. *Owensboro*, 173 U.S. 664 (1899) this Court was called upon to adjudge the validity of a state franchise tax imposed on a national bank. The Court referred to the principles of *M'Culloch* v. *Maryand* and *Osborne* v. *Bank of the United States*, and held that it "follows" from those principes that states are without power to tax national banks except for permissive legislation of Congress which had not been granted for the tax involved.

The Federal Reserve System. In the latter half of the last century, state banks continued to grow (after a temporary drop-off following the banknote tax) because of the development and profitability of deposit banking. By 1892 the number of state banks over took the number of national banks and the dual banking system, as we know it today, had become firmly established.[22]

Monetary control, however, was still insufficient to prevent recurring crises, panics and depressions. In 1912 the National Monetary Commission issued its report criticizing the banking system on a number of counts, including a charge that the bond-secured currency was too rigid and inelastic and that there was no way to mobilize cash reserves in times of trouble.[23] This Report led to the Federal Reserve Act of 1913[24] which sought to tie

---

[19] Act of February 25, 1863, c. 58, 12 Stat. 665.

[20] Act of June 3, 1864, c. 106, 13 Stat. 99.

[21] Act of Mar. 3, 1865, c. 78, 13 Stat. 484; See also, Act of July 13, 1866, c. 184, 14 Stat. 146; *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533 (1869).

[22] *Banking Studies*, n. 14, *supra*, at pp. 15, 418.

[23] S. Doc. No. 243, 62 Cong., 2d Sess. (1912).

[24] Act of Dec. 23, 1913, c. 6, 38 Stat. 251.

the multitude of individual banks together by erecting a superstructure consisting of twelve regional Reserve banks which, in turn, were tied together by the Federal Reserve Board in Washington, D.C. A flexible currency was provided through the issuance of federal reserve notes, which are obligations of the United States as well as of the Federal Reserve banks, and secured by a first and paramount lien on all of the assets of the Federal Reserve banks. Existing national bank notes were to be retired gradually over a period of twenty years. In addition to holding the reserve deposits of their member banks, the Federal Reserve banks were to re-discount commercial paper, collect checks for them and supply coin and currency to them. They were also to act as depositories and fiscal agencies of the Government, and the sub-treasuries were abolished in 1920.

The dual banking system. In addition to shifting the monetary and credit control to the Federal Reserve System, Congress commenced to broaden the powers of national banks as private commercial banking corporations, thereby enhancing their ability to compete with state banks. National banks were for the first time permitted to make mortgage loans and given trust powers in the Federal Reserve Act of 1913, both of which authorities were subsequently considerably expanded. The McFadden Act of 1927, which was specifically designed to modernize the National Bank Act so as to make national banks more competitive with state banks, expanded the power of national banks in a number of respects, including their right to purchase investment securities, but, particularly, in connection with the right to branch which its state bank competitors held.[25]

Legislation in later years continued to enhance the monetary and credit control authority of the Federal Re-

---

[25] *Banking Studies, supra* n. 14 at p. 61. See, *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966).

serve System. Thus Congress looked to the Federal Reserve System for emergency action during the "banking holiday" of 1933. The Banking Act of 1935 was principally for the purpose of concentrating responsibility for national credit policies, and strengthening the power of the Federal Reserve Board to coordinate the activities of the twelve Federal Reserve Banks.[26]

By 1935 the metamorphosis of national banks was complete. As noted earlier, the Federal Reserve Act had authorized the retirement of national bank notes. On August 1, 1935, the last of the federal bonds securing the privilege were retired. Further, while Congress was continuing to expand the general commercial banking powers of national banks, the courts were making it clear that national banks, like state-chartered banks, were subject to ordinary laws applicable to other private corporations such as the Federal anti-trust laws (Sherman and Clayton Act);[27] labor laws,[28] and securities laws.[29]

Whereas during this period there was a gradual, but drastic, factual change in the relationship of national banks to the federal government, the doctrine of national bank tax immunity as "federal instrumentalities" was almost ritualistically applied as each case arose dealing with the power of state to tax national banks. Cases still cited *M'Culloch* v. *Maryland*, or *Owensboro*, which, in turn, relied upon *M'Culloch*.[30] No real independent examination was made of this constitutional doctrine in the light of changed facts, although in at least one case the Court indicated a general awareness of change when it said "(t)hough the national banks' usefulness as an

---

[26] *Banking Studies, supra* n. 14, at p. 59.

[27] *See* 15 U.S.C.; *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

[28] *See* 29 U.S.C.; *NLRB* v. *Bank of America*, 130 F.2d 624 (9th Cir. 1942).

[29] *See* 15 U.S.C. § 78.

[30] *See* n. 10, *supra*.

agency to provide for currency has diminished markedly, their importance as general banks show a constant growth." *Colorado National Bank* v. *Bedford*, 310 U.S. 41, 48 (1940).

The Supervisors submit that the position of national banks after 1935 is clearly that of a purely private association organized and operating for profit. As was stated in *NLRB* v. *Bank of America*, 130 F.2d 624, 626-7 (9th Cir. 1942):

> "It [a national bank] is a privately owned corporation, privately managed and operated in the interest of its stockholders. United States Shipping Board Emergency Fleet Corporation v. Western Union Telegraph Co., 275 U.S. 415, 416, 425, 48 S. Ct. 198, 72 L.Ed. 345. The United States did not create it, but has merely enabled it to be created. True national banks are subject to strict regulation and supervision, but so are a host of other private enterprises. It is true, also, that national banks may at times be called upon as aids in carrying out the fiscal policies of the government, but their activities in these respects are occasional and incidental to the primary purpose of the individuals who organize them."

All that remains is the fact that national banks receive their charter from the federal government and are subject to federal supervision in their operations. But the mere fact that a corporation or association receives its authority to operate from the federal government and is regulated by the federal government is clearly insufficient to make such a corporation a "federal instrumentality" constitutionally exempt from state taxation. Airlines, radio and television stations, power transmission companies, motor carriers, railroads, telephone and cable companies all require federal licenses and are regulated by the federal government. Yet none of these corporations has been found to be immune from nondiscriminatory state taxation simply by virtue of their federal license or the fact that they are federally regulated.

Aside from the licensing and supervisory role of the federal government, national banks are virtually identical to state-chartered banks. The following table compares the two types of institutions:

	State Banks	National Banks
Ownership	Private stockholders	Private stockholders
Capitol Source	All private	All private
Control	All private	All private
Insured by	97% by FDIC	100% by FDIC
Primary regulatory agency	State authorities	Comptroller of the Currency
Authority to issue legal tender	No	No
Authorized to act as depositories of federal funds	Yes	Yes
Branch authority	Determined by state law	Determined by state law
Membership in FRS	Permitted	Required

Appellant seizes on one distinction between national banks and state banks—the fact that national banks must join the Federal Reserve System [31] while membership in the System is optional for state banks [32]—and argues that this fact requires the Court to hold that national banks are "federal instrumentalities". That this distinction hardly requires such a result is evident from an examination of the role of the Federal Reserve System. The Commission on Money and Credit recently summarized the role of the Federal Reserve System as follows:

> "The Federal Reserve System is charged with the formulation as well as the execution of monetary policy.
>
> * * * *

[31] 12 U.S.C. § 222.

[32] 12 U.S.C. § 321.

> "The System has a regulated private base, a mixed middle component and a controlling public apex.
>
> * * * *
>
> "At the apex stands the Board of Governors (FRB).
>
> * * * *
>
> "The twelve Federal Reserve banks are 'mixed' institutions. * * * Very tangibly, then, as well as legally, the Reserve banks are public service institutions, run at a profit, but not for a profit. Their private 'ownership' is a highly attenuated right. * * * One more item is pertinent: the Reserve banks, their earnings and property are exempt from all taxation, federal and state, except real estate taxes." [33]

The "private base" is, of course, the "member banks," that is all national banks and those state banks which join the System. There is no doubt that national bank members are, like state bank members, private associations operated for a profit. Appellant argues, however, that because national banks must be members of the system, unlike state banks which have the option of not joining the system, they should be considered federal instrumentalities immune from state taxation.

If national banks, because of their membership in the System, are instrumentalities of the federal government, then it is only logical that state banks which are members of the System should be similarly treated—for, as we have discussed above, there are no essential differences in the function and operation of the two institutions.

However, the Supervisors submit that membership in the System does not result in a bank becoming an instru-

---

[33] Commission on Money and Credit, *Money and Credit* pp. 81-85 (1961). The Commission was a prestigious group of 27 individuals (including the present Secretary of the Treasury) created and financed by the Ford Foundation, the Merrill Foundation and the Committee for Economic Development to "prepare the first comprehensive survey in half a century of public and private financial institutions, policies, and practices in the United States."

mentality of the federal government. This view is based on an examination of how the System operates. The Commission on Money and Credit describes the operation as follows:

> "Of the System's three instruments of general monetary policy—changes in member bank reserve requirements, changes in the rediscount rate, and open market operations—the first is lodged clearly with the FRB. The second, the rediscount rate, is 'established' every two weeks by each Reserve bank, but is subject to the review and determination" of the FRB.
>
> * * * *
>
> "The control of open market policy, the third and most flexible instrument, is formally vested not in the Board but in the FOMC [Federal Open Market Committee]." [34]

It is thus clear that national banks play no direct role in the formation or implementation of federal monetary policy. Nor do they, of course, perform their earlier function of issuing currency.

One final area of examination is necessary, *i.e.*, what *indirect* role, if any, is played by national banks in connection with the above described instruments of the System. First, national banks play no part whatsoever in the use of the System's primary instrument—open market operations. Second national banks play no particular role with regard to the System's rediscount rate. The rediscount rate simply determines the price at which member banks may borrow from the Reserve banks. By lowering the rate the Reserve banks make money available to member banks (and indirectly to non-member banks) more cheaply. National banks may or may not choose to borrow money from Reserve banks at the current rate just as may state member banks.

---

[34] *Id.*

Finally, there remains the area of the System's reserve requirements for member banks. By raising the reserve requirements of its member banks the System contracts the money supply and vice versa. Appellant contends that but for the required membership of the national banks in the System the System would be unable to effectively use this instrument. They posit a situation where none or only a few banks would be members of the System and thus the System's reserve requirement would be applicable to too few banks to have any effect on credit.

This argument will not withstand close scrutiny. First, even assuming it were correct that national banks are the only banks which make "effective" the System's use of the reserve requirement as an instrument of monetary policy, such instrument is only one of the System's methods of implementing government policy. Further, membership in the System is really optional for any bank. No bank is required to operate under a federal charter—it may choose which charter it will operate under at its inception and change charters at any time during its life. A bank always has the *option* of becoming a member of the System or leaving it. Thus, this distinction is minimal and will not support a constitutional holding that a national bank is a federal instrumentality.

Second, as a matter of practical fact, more than 58% of the assets of state commercial banks are in banks which have chosen to be members of the System. See Appendix A. Thus membership is apparently so advantageous that almost all of the large state commercial banks have elected to join the System. Viewed in this light, the requirement that national banks become members of the System while state banks have an option becomes virtually meaningless —a distinction without a difference.

In concluding this portion of this brief, the comments of Mr. Justice Frankfurter on the decision in *M'Culloch* v. *Maryland* made in his opinion in *Graves* v. *New York*,

306 U.S. 466, 488-490 (1939), seem particularly pertinent:

> "Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.
>
> The arguments upon which M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579, rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in M'Culloch v. Maryland. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' Id. at p. 431."

He went on to say that the

> "The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: 'The power to tax is not the power to destroy while this court sits.' Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 223, 72 L. ed. 857, 859, 48 S. Ct. 451, 56 A.L.R. 583 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount."

He concluded:

> "The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution."

A "fair conception" must lead to the conclusion that national banks can no longer be considered instrumentalities of the federal government for the purpose of tax immunity in the absence of specific Congressional assent. The tax in *M'Culloch* was a discriminatory tax aimed at the heart of the second Bank of the United States, clearly an instrumentality of the United States Government, and patently designed to destroy it. The sales and use taxes here involved are applied to national banks which are private corporations engaged in profit-making activities and standing in full functional parity with state-chartered banks belonging to the Federal Reserve System. Their *current* relationship to the federal government is *light-years* away in quality from that held by the second Bank of the United States.

In view of the foregoing, the Supervisors respectfully submit that national banks can no longer be considered instrumentalities of the federal government for the purpose of tax immunity in the absence of specific Congressional assent.

II. Congress Has Not Prohibited a Nondiscriminatory State Sale and Use Tax on National Banks

The Appellant makes the additional contention that Congress, having passed the enabling act under which national banks may be organized, has the right to immunize those corporations from state taxation and has, in fact, prohibited a sales and use tax on national banks. It bases this argument upon 12 U.S.C. § 548, which was

first enacted in 1864 and amended several times since that date.[35]

The major support for this argument is the citation of principle cases of this Court (Br. p. 11) which hold that a state may not levy any tax except as set forth by Congress, and that any tax not set forth in 12 U.S.C. § 548 is thereby prohibited. But an analysis of these cases will demonstrate that they rely upon *M'Culloch* or upon *Owensboro*, which in turn relied upon *M'Culloch*.[36] This means that these decisions are based upon the doctrine that national banks are instrumentalities of the federal government for the purpose of tax immunity and may not be taxed in the absence of specific Congressional assent. The Supervisors argue in the prior section of this brief, however, that these decisions should now be reconsidered by this Court based on *current* facts and found to be no longer tenable.

Thus the decisional foundation for Appellant's position is conditioned upon the continuance of the outdated tax immunity doctrine. Appellant would appear to be concerned about this fact for it is quick to offer additional arguments demonstrating Congressional intent to specifically prohibit the application of sales and use taxes to national banks. Thus it points to an unsuccessful legislative effort in 1950 to amend 12 U.S.C. § 548 so as to permit such taxes, as indicative of prior Congressional intent to prohibit such taxes. (Br. pp. 20-21). But this legislative effort can also mean nothing more than that

---

[35] Act of June 3, 1864, c. 106, § 41, 13 Stat. 111. A minor amendment was made in the Act of Feb. 10, 1868, c. 7, 15 Stat. 34 and Congress incorporated the provision as section 5219 of the Revised Statutes in 1878. In the Act of March 4, 1923, 42 Stat. 1499, Congress clarified the concept of "competing capital" and allowed states to tax national bank dividends and income. Finally, in 1926, Congress allowed states to impose franchise and excise taxes on national banks based on their entire income. Act of March 25, 1926, c. 88, 44 Stat. 223.

[36] See n. 10, *supra*.

the bills' proponents were laboring under the erroneous view that the doctrine of constitutional immunity discussed in the preceding section of this brief is valid under current facts. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-9 (1962). It also points to legislation in which Congress has specifically subjected corporations which it has created to nondiscriminatory state, municipal, and local taxation as indicative of the fact that a limited authority to tax cannot be construed as a broad power to tax. (Br. p. 20). But there are many federally licensed corporations with regard to which Congress has remained completely silent, and states have nevertheless been permitted a broad nondiscriminatory right of taxation.[37] Finally, Appellant has delved deeply into the legislative history of the original enactment of 12 U.S.C. § 548 in 1864 in order to supply the specific prohibition against sales and use taxes which the plain language of 12 U.S.C. § 548 does not contain. (Br. pp. 12-17). But these debates reflect a considerable discussion of the constitutionality of state power to tax national banks,[38] and merely demonstrate Congressional intent to put the 1864 statute in line with the *dicta* of Justice Marshall in *M'Culloch* v. *Maryland* that Maryland had an original power to tax the interest of its citizens in the second Bank of the United States, with the added provision that this tax was to be applied in a nondiscriminatory manner.[39] This Court has indicated that the purpose of that statute was to assure a nondiscriminatory application of the named taxes, or a "policy of equalization" between state and national banks. See quotations from *Lewis* v. *Fidelty & Deposit Co.*, p. 7, *infra*, and *Mercantile National Bank* v. *New York*, at p. 7, *supra*.

---

[37] *E.g.*, radio and television stations, airlines, railroads, etc.

[38] Cong. Globe, 38th Cong., 1st Sess., pp. 1412-15, 1890, 1895, 1956, 2622, 2639, 2727.

[39] 17 U.S. (4 Wheat.) at 436.

Appellant's argument, therefore, that Congress intended a specific prohibition of the application of sales and use taxes to national banks in 12 U.S.C. § 548, in spite of the fact that there is no such prohibition therein set forth, must be viewed within the trend of recent decisions of this Court to deny an implied immunity from state taxation to essentially private persons, and to insist on a clear-cut statement of Congressional prohibition if states are to be denied the right to impose nondiscriminatory taxes which do not interfere with the operations of such persons. The court below made that point succinctly in its opinion as follows:

> "Such immunity, however, must be expressly conferred. The Supreme Court of the United States has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co.* v. *Helvering, Commr. of Int. Rev.*, 307 U.S. 57, 60. *Oklahoma Tax Commn.* v. *United States*, 319 U.S. 598, 606. This rule has been rigidly applied in the area of intergovernmental immunity. Congress has not created an immunity here by affirmative action, and '[t]he immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication. *Oklahoma Tax Commn.* v. *United States*, 319 U.S. 598, 604.' *Oklahoma Tax Commn.* v. *Texas Co.*, 336 U.S. 342, 366.' 'Silence of Congress implies immunity no more than does the silence of the Constitution. . . . [I]f it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.' *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 480."

Appellant concedes that the tax here is nondiscriminatory. Appellant does not claim, nor could it claim, that the application of the tax to national banks would adversely affect, or conflict with, its operations. Appellant does not claim, nor could it claim, that the imposition of the tax will result in any burden on the federal govern-

ment. A national bank is 100% privately owned—additional expenses fall on the private owners not the federal government.

Accordingly, no one, not even Appellant, can claim that the taxes here involved in any way disturbs the essential freedom of the government in the performance of its functions. On the other hand, no one, not even Appellant, can deny that permitting national banks an exemption from such taxes not accorded their state tax competitors, runs counter to a sound tax policy of equality which dictates that all business for profit within a state share the cost of government services provided to all, and is, therefore, unduly limiting the taxing power which is equally essential to both national and state governments under our dual system.

In conclusion, the Supervisors contend that Congress did not intend to prohibit states from applying nondiscriminatory sales and use taxes to national banks. The statute does not contain any such prohibition. The only support for Appellant's contention lies with a no longer tenable legal and historical anachronism that national banks are federal instrumentalities entitled to tax immunity.[40]

---

[40] The preceding portion of this brief demonstrating that Appellant errs in contending Congress specifically prohibited states from applying sales and use taxes to national banks makes it unnecessary to consider in detail the authority of Congress to do so. The Supervisors fully recognize, of course, the right of Congress to create a tax immunity for "federal instrumentalities." However, if as contended in the preceding section of this brief, national banks are no longer federal instrumentalities, a serious question arises as to the extent of Congressional power to immunize national banks from state taxation. This Court has not decided this question. See *Graves* v. *New York*, 306 U.S. 466, 478 (1939). The Supervisors would have no difficulty with a Congressional prohibition of state taxes which are discriminatory. However, they would have difficulty in ascertaining the constitutional base for Congressional action in invading the sovereign right of a state to tax to simply prohibit all nondiscriminatory state taxation.

The final section of this brief will separately discuss an additional indication that Congress did not intend the prohibition for which Appellant argues. A sales and use tax applicable to state banks, but not to national banks, places state banks at a competitive disadvantage. A construction of 12 U.S.C. § 548 to render such a result is utterly out of harmony with the rest of the statute which is, as this Court has declared, a "policy of equalization" between national and state banks.

III. Congress Has Recognized the Fact of a Dual Banking System and Has Fostered and Encouraged Competitive Equality Between the Two Systems.

It is apparent that in order for the dual banking system of the United States, consisting of state-chartered banks and national banks chartered under the National Bank Act of 1864 (now 12 U.S.C.A. §§ 21-213), to continue to function as such, there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking.

Congress solved the foregoing problem in a very practical way:

First, it decided upon a "policy of equalization" between national and state banks by *adopting* state law as the standard for national banks in most of the important competitive areas. *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559 (1934). In that case the question was whether a 1930 amendment to the National Bank Act authorizing a national bank to "give security" for state deposits meant merely a pledge of specific assets or a general lien upon the bank's assets. State banks, competitors of national banks for such deposits, had the right to give the more impressive security of a general lien. This Court ruled

in favor of the general lien on the basis of the "policy of equalization" which it held Congress had adopted in the National Bank Act. At 292 U.S. 564-565, Mr. Justice Brandeis, writing for the Court, said:

> "For the main purpose of the 1930 Act was to equalize the position of national and state banks; and without such power national banks would not in Georgia be upon an equality with state banks in competing for deposits. The *policy of equalization* was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation. In amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches; in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization." (Footnotes omitted.) (Emphasis supplied.)

Thus, some of the more important instances of the specific adoption of state law in the National Bank Act are as follows: (a) *Branches.* Section 36(c) adopts state law as the standard for the establishment of branches by national banks. 44 Stat. 1228-29 (1927), as amended, 12 U.S.C. § 36(c) (1964). (b) *Fiduciary powers.* The Comptroller may grant a permit to national banks, "when not in contravention of State or local law," to "act as a trustee . . . or in any other fiduciary capacity, in which State banks . . . which come into competition with National banks are permitted to act under the laws of the State in which the National Bank is located." 76 Stat. 668 (1962), 12 U.S.C. § 92(a) (1964). (c) *Interest on loans.* National banks may charge interest on loans allowed by the law of the state where the bank is located if such a rate is greater than 1% in excess of the discount rate on ninety-day paper in effect at the local federal reserve bank. 48 Stat. 191 (1933), as amended, 12 U.S.C. § 85 (1964). (d) *Interest on time and savings deposits.* National banks may not pay a greater rate of interest than the maximum rate authorized by law upon

such deposits by banks organized under the laws of the state in which the national bank is located. 44 Stat. 1224-25, 12 U.S.C. § 371 (1964). (e) *Capitalization.* In certain instances state law is the measure of allowable capitalization of new national banks. 48 Stat. 185 (1933), 12 U.S.C. § 51 (1964). (f) *Merger and conversion.* No conversion of a national bank to a state bank, or its merger with a state bank, may take place in "contravention of the law of the State in which the National banking association is located." 64 Stat. 456 (1950), 12 U.S.C. § 214c (1964).

Secondly, in addition to specifically applying state law to national banks in many instances, Congress did not seek to occupy the field so as to preclude the application of state laws to national banks which do not conflict with federal law. Sometimes it made a specific reservation of power, as for example, the reservation of powers over bank holding companies, and bank subsidiaries, in the Bank Holding Company Act of 1956, 70 Stat. 138 (1956), 12 U.S.C. § 1846 (1964). The courts have also enunciated this general principal on a number of occasions. Thus in *First National Bank* v. *Missouri*, 263 U.S. 640 (1924), this Court held—at a time prior to the passage of Section 36(c) of the National Bank Act—that a Missouri statute forbidding branch banks was applicable to national banks. Similarly, in *Lewis* v. *Fidelity & Deposit Co.*, a portion of which opinion is quoted above illustrating the "policy of equalization," this Court upheld the applicability of provisions of Georgia law relating to duties of a depository. 292 U.S. 559, 565-6. See, also, *Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1944); *Chase Securities Corp.* v. *Husband*, 302 U.S. 660 (1938); *McClellan* v. *Chipman*, 164 U.S. 347 (1896).

The "policy of equalization" set forth above was affirmed by this Court only last term. In *First National*

Bank v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), this Court was called upon to construe the branch provisions of Section 36(c) of the National Bank Act. This Court concluded:

> "[I]t appears clear from this resume of legislative history of Section 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned. Both sponsors of the applicable banking act, Rep. McFadden and Sen. Glass so characterized the legislation. It is not for us to so construe the Acts as to frustrate this clear cut purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption. *To us it appears beyond question that the Congress was continuing its policy of equalization first adopted in the National Bank Act of 1864.*" (Emphasis supplied.)

This "policy of equalization" has been a two-way street. In some instances it has resulted in the protection of national banks from a competitive advantage asserted by state banks. *E.g.*, *Lewis* v. *Fidelity & Deposit Co.*, *supra*, (security for deposits in state banks). In other instances it has resulted in the protection of state banks from a competitive advantage asserted by national banks. *E.g.*, *First National Bank* v. *Walker Bank & Trust Co.*, *supra* (branching). In both instances, it is apparent that without the "policy of equalization", the dual banking system as we know it today could not survive. Both the National Bank Act,[41] and state statutes, permit a free conversion of state banks to national banks, and *vice versa*. Whenever one class of banks is faced with a major competitive disadvantage with the other, or, indeed, even a conglomeration of small competitive disadvantages, conversions will follow.

The foregoing demonstrates that throughout the years Congress has acted to foster equality between the state

---

[41] 12 U.S.C. §§ 35, 214a.

and national systems. In this framework, it would be erroneous to impute to Congress an intent to handicap state banks vis-a-vis their national bank competitors through unequal taxation. That is the import of Appellant's contention herein which the Supervisors respectfully request this Court to reject.

CONCLUSION

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts below was correct and should be affirmed.

Respectfully submitted,

JAMES F. BELL
BRIAN C. ELMER
1100 Connecticut Avenue, N. W.
Washington, D. C. 20036

Of Counsel:

REAVIS, POGUE, NEAL & ROSE

March 29, 1968

APPENDIX A

THE DUAL BANKING SYSTEM
(as of June 30, 1967)

State Banks	Number of Banks	Percent All Banks	Total Assets	Percent All Assets
Commercial	8,982	63.0	$172,752	36.0%
Mutual	505	3.5	64,153	13.4
Total	9,487	66.5	236,905	49.4
National Banks	4,780	33.5	242,685	50.6
All Banks	14,267	100	479,590	100
State Banks				
Commercial:				
Federal Reserve Members	1,327	14.8	$100,220	58.0
Insured Non-Members	7,426	82.7	69,012	39.9
Non-Insured	229	2.5	3,520	2.1
Total	8,982	100	172,752	100
Mutual Savings Banks	505		64,153	
Total	9,487		236,905	

NOTES: All member banks of the Federal Reserve System are insured by the FDIC, 12 U.S.C. § 1814. All national banks are members of the Federal Reserve System, 12 U.S.C. §§ 222, 223. All mutual savings banks are state chartered. Of the 505 mutual savings banks, 334 are insured by the FDIC and 171 are non-insured.

SOURCE: Report of Call No. 80, Federal Deposit Insurance Corporation (1967) pp. 2-3.

APPENDIX B

STATE SALES AND/OR USE TAXES

States Imposing Sales and/or Use Taxes	Applicable to Purchases by National Banks*	
Alabama	No	Ala. Dept. of Rev. Rule B1-021, reissued January, 1961.
Arizona	No	Ariz. Attorney General Opinion, Nov. 28, 1956.
Arkansas	No	Director, Sales Tax Division, Letter of July 31, 1952.
California	Yes	State Tax Counsel Ruling, June 4, 1964.
Colorado	No	Colo. Rev. Rule No. 41.
Connecticut	No	Letters from Tax Commissioner to CCH, April 12, 1960; Feb. 3, 1959.
District of Columbia	Yes	D.C. Code § 47-2605(a) (1967); D.C. Sales Tax Reg. § 201(g).
Florida	Yes	Fla. Sales & Use Tax Rule 318-1.65, revised Nov. 20, 1965.
Georgia	No	Ga. Rev. Rule 560-12-2.111.
Hawaii	No	Haw. Rev. Laws, § 117-20(a) (1955).
Idaho	Yes	Id. Code § 63-3619 (Supp. 1967).**
Illinois	Yes	*Continental Illinois National Bank & Trust Co.* v. *Hulman*, County Superior Ct., Apr. 23, 1965.
Indiana	No	Ind. Sales Tax Circular ST-45, Aug. 7, 1964.
Iowa	Yes	Iowa Sales & Use Rule No. 50.
Kansas	Yes	State Rev. Comm. Bul., Dec., 1950.
Kentucky	Yes	Ky. Code § 139.200 (1962).**
Louisiana	No	La. Rev. Bul., Nov. 25, 1943.
Maine	No	Me. Sales & Use Tax Instruction Bul. No. 16.1.

STATE SALES AND/OR USE TAXES—(Continued)

States Imposing Sales and/or Use Taxes		Applicable to Purchases by National Banks*
Maryland	No	*Farmers & Mechanics-Citizens National Bank* v. *Comptroller*, Frederick County Cir. Ct., No. 3598 Misc. Nov. 2, 1960.
Massachusetts	Yes	Mass. Sales & Use Tax Emergency Reg. No. 6, May 31, 1966.
Michigan	Yes	Mich. Sales & Use Tax Rule 29.
Minnesota	Yes	Minn. Stats. Ann. § 279A.02 (Supp. 1967).**
Mississippi	Yes	Miss. Sales & Use Tax Rule 26, June 1, 1958.
Missouri	No	Mo. Sales/Use Tax Rule No. 12.
Nevada	Yes	Attorney General Opinion, Dec. 8, 1961.
Nebraska	Yes	Neb. Sales & Use Tax Rule TC-1-72.
New Jersey	Yes	N.J. Stats. Ann. § 54:32B-3 (Supp. 1967).**
New Mexico	Yes	Letter, Chief Counsel, to CCH, May 2, 1962.
New York	Yes	N.Y. Taxation Code Art. 59, § 1105 (1966).**
North Carolina	No	N.C. Sales & Use Tax Reg. 48.
North Dakota	Yes	N.D. Sales Tax Rule No. 17 (as amended July 1, 1953).
Ohio	No	Ohio Sales & Use Tax Rule TX-15-22.
Oklahoma	No	Opinion of Attorney General, July 11, 1939.
Pennsylvania	Yes	Pa. Sales & Use Tax Reg. 206 (2).
Rhode Island	Yes	R.I. Sales & Use Tax Reg., Released March 8, 1954.
South Carolina	Yes	S.C. Sales & Use Tax Rule S-R-42.

STATE SALES AND/OR USE TAXES—(Continued)

States Imposing Sales and/or Use Taxes		Applicable to Purchases by National Banks*
South Dakota	Yes	S.D. Code § 57.3201 (Supp. 1960).**
Tennessee	Yes	Tenn. Code Ann. § 67-3003 (Supp. 1967).**
Texas	No	Texas Sales & Use Tax Ruling No. 95-0.35.
Utah	No	Utah State Tax Reg. S54.
Virginia	Yes	Va. Sales & Use Tax Reg. § 1-12.
Washington	Yes	Wash. Rev. Act Rule 190.
West Virginia	No	W. Va. Retail Sales & Use Tax Reg. CUT § 1.28.
Wisconsin	No	Memorandum. Ass't Commissioner of Taxation, February 24, 1966.
Wyoming	No	Letter to CCH from Special Assistant Attorney General, Oct. 3, 1958.

* All citations available in Commerce Clearing House, *All States Sales Tax Reporter* ¶7.125, *et. seq.*

** Citation is to section imposing sales and/or use tax on all taxable sales, without an exception for national or state banks.

Note 1. The rationale for exempting national banks from sales and/or use taxes, when stated, is that national banks are constitutionally exempt. See, *e.g.*, Alabama Department of Revenue Rule B1-021, reissued January 1961; Opinion of Attorney General of Georgia, May 10, 1951; Maine Sales & Use Tax Instruction Bulletin No. 16.1.

Note 2. The following states specifically exempt state banks from sales and/or use taxes: Colorado (Colorado Revenue Rule No. 410); Georgia (Georgia Revenue Rule 560-12-2.111); Hawaii (Haw. Rev. Laws, § 117.20(b) (1955)); Louisiana (Louisiana Act No. 445 (1966)); Texas (Texas Sales & Use Tax Rule 95-0.37, as amended, June 10, 1965).

Note 3. The following states impose no sales or use taxes: Alaska, Delaware, Montana, New Hampshire, Oregon and Vermont.